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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(El Dorado)

In re A.Z., a Person Coming Under the Juvenile Court
Law.

C091131

EL DORADO COUNTY HEALTH AND HUMAN
SERVICES AGENCY,

(Super. Ct. No.
PDP20170066)

Plaintiff and Respondent,

v.

P.Z.,

Defendant and Appellant.

P.Z., father of the minor (father), appeals from the juvenile court's order terminating his parental rights and freeing the minor for adoption. (Welf. & Inst. Code, §§ 366.26, 395.)¹ He contends the juvenile court and the El Dorado County Health and

¹ Undesignated statutory references are to the Welfare and Institutions Code.

Human Services Agency (Agency) failed to comply with the requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). He further contends the court erred by not finding the beneficial parental relationship exception to adoption applied. (§ 366.26, subd. (c)(1)(B)(i).) We will reverse and remand for limited ICWA proceedings and will otherwise affirm the juvenile court's orders.

FACTUAL AND PROCEDURAL BACKGROUND

There have been 27 child welfare referrals related to this family dating back to 2004, most of which related to allegations of neglect, deprivation, and emotional abuse due to the parents' mental health issues, substance abuse problems, and domestic violence in the home. This case is the family's fourth Child Protective Services (CPS) case related to father since 2008, and the second one involving this minor. Father has participated in several family maintenance programs, all involving issues with father's untreated mental health, refusal to take medication, substance abuse, domestic violence, and unsanitary living conditions. The minor was first removed from parental custody in May 2014 while the parents were participating in family maintenance and was returned to the parents' care in July 2014 after the parents came back into compliance with their case plan. Each of the prior family maintenance cases was eventually dismissed after father's successful completion of services. In 2016, father was made the sole primary caregiver of the minor and the minor's siblings through the family law court following a domestic violence incident at the end of 2015 between father and mother where mother was deemed the primary aggressor.

This case, the third intervention by the Agency, arose in September 2017 due to father's inability to provide the then four-year-old minor and his 17-year-old sibling, P.Z., with appropriate treatment and services, and father's failure to adequately address the physical and mental health needs of the children.

On September 18, 2017, the Agency filed a dependency petition on behalf of the minor and his siblings, P.Z. and 15-year-old D.Z., pursuant to section 300, subdivisions

(b) and (j).² The petition alleged father's inability to provide regular care for the minor and P.Z. due to father's mental illness. P.Z. was diagnosed with autism and clinical depression and was experiencing continuous suicidal ideations and recent suicide attempts. Father denied the severity of P.Z.'s behavior and ignored P.Z.'s mental health issues, believing it was just a phase to get out of going to school. P.Z. also suffered from an untreated medical condition for which father failed to seek treatment. The minor had significant developmental delays himself for which father failed or refused to obtain recommended assessments and services. The Agency attempted to provide father with services to prevent or eliminate the need for detention, but father refused all involvement. The petition also alleged the minor and P.Z. were at substantial risk of abuse or neglect due to prior abuse or neglect of their sibling D.Z. The minor and P.Z. were ordered detained on September 25, 2017.

Once placed in foster care, the minor was diagnosed with anemia, vitamin D deficiency and general malnourishment. His pediatrician was also concerned he had rickets. The minor's caregiver noted the minor spoke very few words and would often stare blankly into space. When father was asked about these issues, he stated there was plenty of food in the home and the children ate all day long, but he was unwilling to identify the types of meals provided other than to characterize them as "healthy foods." He did not want the minor to have speech therapy and he denied he was negligent in meeting the needs of the minor and his siblings for medical, dental, and mental health services.

According to the October 2017 jurisdiction report, the Agency had a number of concerns regarding visitation between father and the children. Father reportedly had great difficulty regulating his emotions and behavior during visits, and he was unable to

² The minor's siblings, P.Z. and D.Z., are not parties to this appeal and will be mentioned only when relevant to the issues on appeal.

refrain from bringing up inappropriate conversations related to the dependency case despite numerous prompts from the visitation supervisor.

It was also reported that father was in stable housing but his compliance with services was extremely limited and his recent behaviors, including emotional dysregulation and delusional and disorganized thinking evidenced by bizarre statements outside the bounds of reality, indicated his mental health condition had decompensated significantly and his ability to function was severely impaired. He was in denial of his mental health incapacity and was unwilling to seek appropriate care and treatment, and the Agency was concerned he was demonstrating extreme volatility to the point of threatening violence. The Agency was also concerned about father's inappropriate use of social media to make comments and post specifics related to the confidential dependency proceedings and his interactions with the Agency and the court in a public forum.

On November 9, 2017, the court sustained the allegations in the petitions, as amended to include the following: the minor had serious developmental delays for which father failed to support recommended services as found in the minor's individualized education plan (IEP); father allowed the minor's siblings to provide for the minor's basic needs, including eating; father failed to provide for the minor's medical issues; and father's neglect of the minor was a result of father's mental illness which rendered father unable to provide regular care for the minor.

As set forth in the December 2017 disposition report, the Agency recommended continued out-of-home placement of the minor until father could demonstrate his ability to stabilize his mental health condition and show his ability to maintain that stability by consistently being compliant with his mental health treatment and eliminate the use of drugs and alcohol.

The visitation supervisor and father's mental health provider reported that supervised therapeutic visits were going well. Father was no longer attempting to discuss the case in front of the children and his mood and presentation was improving. The

minor was very interactive with father. The Agency recommended increased visitation so long as it was supervised.

At the December 1, 2017 disposition hearing, the court set the matter for a contested hearing, made ICWA orders (as discussed below), ordered reunification services for both parents, and authorized increased supervised visits for father.

The court appointed special advocate (CASA) reported, on January 23, 2018, that the minor was initially sullen, frail, and not well but was now “a thriving happy little boy.” The CASA opined that it was in the minor’s best interest to remain in his current long-term foster home while the parents participated in reunification services. The foster mother reported the minor was quiet, removed, and out of sorts when he returned from visits with father.

According to the January 2018 addendum report, father was participating in mental health services following a psychological evaluation, including counseling and psychotropic medication. He was diagnosed with bipolar disorder with psychosis and was recommended for a neurological evaluation to ascertain whether and to what extent, if any, father’s traumatic brain injury at five years of age impacted the current state of his mental health and overall functioning. Father completed an alcohol and other drug (AOD) assessment and was referred to weekly drug testing and substance abuse treatment. He tested positive for marijuana eight times despite his claims that he rarely smoked marijuana. Father also failed to take the appropriate steps to engage in outpatient drug and alcohol treatment.

The minor transitioned from his original placement to his concurrent planning home on December 12, 2017, where he engaged well with the foster family and enjoyed showing off his toys and his bed and playing with his two older foster siblings.

Therapeutic visitation between father and the minor was going well. Father responded well to support and prompting by the therapist. However, father’s mental health continued to be a concern for the Agency. Father continued to deny experiencing

mental health issues and denied that the Agency's involvement was directly related to those issues. Father expressed that the Agency's involvement was unwarranted and that the social worker was colluding with mother to keep the children from him, and he did not see any safety concerns that resulted in removal of the children from his custody. He denied the minor was malnourished and refused to consider how the minor's health was negatively impacted while in his care. Father took no accountability regarding the neglect his children endured in his care and had minimal insight into the children's needs. Thus, the Agency could not recommend return of the minor to father.

On January 30, 2018, the court ordered an additional six months of services for father and continued supervised visitation with the minor.

The status review report filed July 25, 2018, stated the minor was diagnosed with autism and global developmental delay and qualified for Alta Regional Center services as of March 2018. The Agency opined that the minor's exposure to neglect, domestic violence, and substance abuse by his parents contributed to his social delay. While the minor did not qualify for extended services to address his speech, language, and fine and gross motor skills deficits, the Agency noted he "clearly requires intensive structure and support in the areas of his deficits."

Father was required to participate in two parenting sessions, the first of which was ultimately scheduled for July 30, 2018, during which he would receive direct instruction from the minor's speech and language pathologist and occupational therapist. Father was informed of the minor's upcoming IEP meetings which he agreed to attend by telephone. At the start of the first meeting, father called in and informed the speech pathologist he was unable to attend at the scheduled time due to a conflict. He consented to move forward with the meeting in his absence. Two days later, the social worker met with father and provided him with a bus pass so father could travel to the minor's school to meet with the minor's speech pathologist and review and sign the IEP. At the social

worker's request, father's mental health aide transported father to the school where he reviewed and signed the IEP.

The report stated the minor's caregiver was an elementary school teacher who worked diligently with the minor on his development and was an "excellent advocate" for him. The minor enjoyed playing with his foster siblings.

The report referenced a psychological examination of father by Dr. Eugene Roeder in 2008, the results of which confirmed father's mental illness raised concerns about the emotional health and safety of the minor and his other children. The exam results also confirmed close monitoring of father was essential, as was assuring he complied with his mental health counseling. At that time, Dr. Roeder recommended that father participate in a psychiatric evaluation and confirmed father was at high risk "for the type of decompensation which would render him incapable of appropriate parenting and likely even make him a risk to his sons' health, safety and welfare." Dr. Roeder noted that the likelihood of such decompensation would likely decrease if father's mental health challenges were monitored and treated with appropriate medication and supportive counseling.

Father participated in a more recent psychological evaluation with Dr. Jayson Wilkenfield in November 2017, the results of which confirmed father was still experiencing periodic and debilitating symptoms of anxiety and he had very limited insight into the degree to which his difficulty regulating his emotions and relating to a linear history and his "rather eccentric interpersonal style" affected his ability to establish and maintain relationships with others. The evaluation noted father was "conspicuously disinclined to acknowledge responsibility for any of the circumstances that resulted in his children being removed from his custody," and he appeared to have a limited capacity for empathy for the minor's older sibling, D.Z., whom he believed was colluding with mother to keep his children from him. Father was also suspicious and mistrustful of the Agency's motives. Dr. Wilkenfield diagnosed father with bipolar disorder, unspecified

anxiety disorder, and personality disorder distinguished by paranoid personality attributes, noting that, in the absence of neuropsychological testing, it was impossible to ascertain to what degree father's anxiety and dysfunction in overall personality organization were attributable to the serious head injury he suffered at the age of five. Dr. Wilkenfield opined that it was doubtful father would be capable of sufficiently benefitting from any services the Agency could provide within the legal timeframe for reunification such that returning the minor and his siblings to father would not place them at an elevated risk for neglect or harm. Dr. Wilkenfield was concerned about what would happen when the oversight and guidance father was receiving from the Agency and service providers was relaxed or withdrawn and father was again left to his own devices in attending to the children's needs and welfare.

Father participated in weekly individual counseling, weekly dialectical behavioral group therapy, and weekly anger management, and he reportedly made progress in mental health treatment. After a month of not communicating with the social worker and not showing up for a scheduled in-home meeting, father finally met with the social worker weekly between February and March 2018, and developed a list of goals and objectives. However, on March 28, 2018, the social worker terminated the in-home meetings early due to father acting "bizarre" and being overly "fixated" on various conspiracy theories from which father was unwilling or unable to be redirected. Two months later, the social worker reported father had ceased responding to efforts to coordinate meetings and, during the month of May, failed to respond to numerous telephone calls and text messages sent by the social worker.

On June 4, 2018, father was assigned a new social worker, Jean Dalman. The following months, Dalman submitted a progress report stating that, while father was attending meetings consistently and was eventually open to implementation of a monthly calendar, he also discussed having worms in his body and persisted in his claim that

social worker Brianne Hickey was married to someone in mother's family which contributed to the removal of his children.

Father was referred to Alta Regional Center to determine if he qualified for services based on his childhood head injury. However, father decided not to pursue the assessment stating his head injury was "not that serious" and indicating his therapist did not believe he needed the support. Father was also referred to outpatient substance abuse treatment but was dropped from the program waitlist due to his failure to follow through as directed. He eventually began treatment at Progress House on May 10, 2018. In late-June 2018, the Progress House program manager, Kristina Harris, reported that father was sometimes difficult to redirect and often times had trouble seeing his part in CPS's involvement in the case. He did not understand that it was not normal for his son to say he wanted to kill himself, believing it was normal for all teenagers.

Father reportedly demonstrated a serious effort and willingness to attend visits with the minor and D.Z., who both appeared comfortable with father. However, father struggled to engage in play and other developmentally appropriate activities with the minor. Beginning in mid-February 2018, the minor seemed resistant to father's efforts to engage him in play and, in return, father generally ignored the minor and focused his attention on D.Z. On one occasion, father walked with the minor and D.Z. to a nearby restaurant but had to be reminded to ensure the minor's safety while crossing the street. On other occasions, father cancelled visits or arrived disheveled and in a negative mindset. In May 2018, he was anxious about an active volcano in Hawaii and was reportedly fixated on his concerns. In June 2018, father had to be redirected from talking about his previous stint in jail and his personal mental health challenges. During another visit, father was engaged in a lengthy discussion with D.Z. about religion and had to be redirected to focus on the minor, at which point father commented that it was his "civil right" to discuss religion.

During another visit with just the minor, father immediately turned on a movie for the minor to watch. When he was informed that he needed to interact with the minor, he became visibly agitated. The social worker told the minor to pick out a toy or book, but father was intent on discussing his participation in mental health services and his anger towards mother. Father also challenged the social worker's attempts to have him interact directly with the minor and help develop the minor's speech.

Because father's therapeutic supervised visits were generally appropriate, the therapeutic visits were changed to normal visits supervised by the Agency. The Agency recommended that visits continue to be directly supervised due to father's inconsistency in focus, mood, mental state, and engagement during visits, as well as concerns that father was not adequately supervising the minor while in the community.

During a May 3, 2018 meeting between father and the social worker, father blamed the minor's sibling, D.Z., for "breaking up" his family. Father also claimed the minor's school was not properly feeding the minor, and special education "does not help kids." The social worker expressed concern that father still refused to acknowledge the reasons for removal of the minor. The Agency concluded father's inflexible thinking and limited insight appeared to be a barrier to father's ability to take full responsibility for his behaviors and how they have affected his children over time, or to identify and acknowledge the minor's needs, placing the minor at risk. This was particularly concerning given father's history, in prior dependency cases, of not following through in accessing support once the Agency is no longer involved, as well as the fact that he does not believe his children were ever at risk while in his care.

The Agency recommended continued out-of-home placement for the minor and continued services to father. Father submitted on the Agency's recommendations and the court adopted the recommended findings and orders, including that the Agency be given the discretion to increase visits between father and the minor. The court set the matter for a 12-month review hearing.

According to the October 2018 status review report, the minor was flourishing. His understanding and use of language were significantly delayed but had improved. The minor was also doing well with his caregivers, who requested to pursue adoption in the event reunification with the parents failed.

As of October 11, 2018, father was medication compliant, although he asserted he did not need to take psychotropic medication for the rest of his life, and became frustrated and agitated when his mental health treatment was discussed. Father's psychiatrist, Dr. Ravinderjit Singh, stated that, due to father's chronic mental illness and history of multiple hospitalizations due to suicide attempts, father needed to be on medications "for a long run to stay stable." Dr. Singh noted father's failure to continue taking his medication could result in manic and depressive symptoms, poor sleep, pressured speech, suicidal thoughts, disorganized and delusional thought process, paranoia, inability to think clearly, and an inability to be in touch with reality, symptoms father displayed in the past when not taking his medication.

Father participated in mental health counseling and reportedly made progress in that he seemed more focused. However, he continued to believe that social worker Hickey was biased against him, was married to an individual closely associated with mother, and was a barrier to his reunification with the minor and his other children, despite that these accusations had repeatedly been refuted and found untrue by the court. Father also claimed Hickey should be pursuing the minor's school for not adequately meeting the minor's nutritional needs.

Father's attendance and participation in parenting classes was inconsistent. He continued to have problems with his own personal hygiene and the general environment of his home, which had a notable foul odor despite efforts at deep cleaning.

Father was participating regularly in supervised visitation with the minor and was energetic and excited and generally focused on the instruction at hand. However, there were still moments when he did not seem to internalize what the instructors were saying.

Father also continued to have trouble engaging with the minor and needed to be redirected. He also had to be reminded to care for the minor, such as putting the minor in the car for transport or arranging for someone to monitor the minor when he stepped away.

The Agency concluded that, while father's participation in services had improved, he did not perceive himself as having any deficits in caring for his children and he rarely performed the learned techniques during visits. And, while father had consistent involvement in mental health services, he did not readily acknowledge that his mental health may have also contributed to the neglect of his children. At times, father was in complete denial as to the significance of the minor's needs and how father's past behaviors potentially contributed to the minor's delays. Father's judgment appeared "questionable," demonstrating a minimal understanding of and commitment to the long-term best interests of both him and the minor. The Agency recommended the court terminate father's services and set the matter for a section 366.26 hearing.

CASA Frank Maio filed a report on October 18, 2018, recommending that the minor remain in his current placement. The report noted the foster family's love for the minor and their desire to adopt him, and that the foster parents were well-equipped to deal with the minor's many issues, both physical and emotional. Maio stated the minor made significant progress over the past year: he was no longer fearful of every stranger he came into contact with, he made constant eye contact and greeted Maio, and called Maio by his first name and was comfortable in Maio's presence. Finally, Maio noted that, while the minor made significant progress, he still had "a significant way to go before he reaches the intellectual and developmental milestones expected for his age group."

At the 12-month review hearing on October 19, 2018, the court returned D.Z. to father's care under a plan of family maintenance and set the matter for a contested hearing as to the minor.

The contested 12-month review hearing commenced on November 27, 2018. Following testimony from several witnesses, the court set the matter for an 18-month review hearing on March 15, 2019, and extended father's services to that date.

On December 18, 2018, the court modified the visitation order to include one 2-hour monitored visit during the week and one 4-hour visit on the weekend, supervised by father's parenting coach.

The March 2019 status review report included the Agency's recommendation that the court continue the minor's out-of-home placement, terminate father's reunification services, and set the matter for a section 366.26 hearing. The minor continued to progress in his current placement. His vocabulary had expanded, he was able to express his wants and needs, he was able to brush his teeth without assistance, and he was toilet trained. However, the minor still chose to communicate nonverbally and did not interact directly with his peers, and he was still not meeting academic standards in several areas. Father continued to refute the minor's diagnosis of autism and disabling condition of global developmental delay, believing the minor's delays were due to his removal from father's care.

Father was participating in services, including individual counseling and mental health treatment. However, he believed an increase in his medication was a consequence of him "acting up" in group counseling. He hesitantly agreed to medication in order to get the minor back but made several social media posts suggesting otherwise. Father was participating in substance abuse treatment and testing negative. He graduated from outpatient drug treatment at Progress House in January 2019, and graduated from a substance abuse treatment group the following month. While father was progressing in independent living skills, he was "up and down" in terms of his willingness and ability to utilize skills learned in the program.

Father participated in another psychological evaluation in January 2019. The evaluator concluded that, while father loved his children, concerns remained about

father's ability to parent the minor and provide consistent structure and safety without support, and whether father would be medication compliant. In February 2019, the social worker met with father and his adult daughter, E.Z. Father attempted to defend himself regarding the allegations in the petition, all of which he denied, and he further denied medical findings regarding the minor's malnourishment. Father refused the social worker's direction to schedule an appointment with his physician to obtain a referral to a neurologist regarding his alleged traumatic brain injury and became agitated, unfocused, and argumentative. When the social worker reminded father of his criminal conviction history, father quickly escalated and could not be calmed down, even by his daughter. Thereafter, father posted his entire psychological evaluation on his social media account, violating the minor's confidentiality by doing so.

Father was more mentally present and interactive with the minor during monitored visitation, but he still required improvement with respect to meeting the minor's basic needs, including food and cleanliness, and the minor's emotional needs. The social worker observed father's ability to think clearly and rationally appeared to decrease significantly during times of stress. During November and December 2018, father displayed concerning angry and delusional thinking prior to and sometimes during supervised visits. In January 2019, father had to be redirected away from speaking negatively about mother in the minor's presence. It was also noted that father failed to hold the minor accountable, support him through tantrums, or read his cues, and father quickly abandoned the task if the minor opposed his request or direction, failing to maintain structure or demonstrate basic parenting techniques. The minor's caregivers reported the minor generally did not want to leave for visits with father on Saturday mornings. Upon return from the visits, the minor was tired and withdrawn.

At weekly Growing Healthy Children visits, the minor's speech and language therapist noted that, while father stated he understood the tools he was instructed to use, she had not yet seen him implement any of those skills. The therapist further noted

ongoing issues with father's inability or unwillingness to implement strategies taught to him. Father continued to discuss topics unrelated to the visit and often insisted his actions were correct despite the therapist indicating otherwise. When the therapist attempted to offer multiple new basic child development facts, father persisted in his claim that the therapist's information was incorrect and was not open to learning new information.

Following a March 2019 child and family team (CFT) meeting, the social worker assessed father's support and safety network as very limited, noting the individuals he identified had never attended a CFT meeting despite the Agency's encouragement of father to invite them.

The Agency concluded that, while father had stabilized in the last 18 months, his significant history of neglect and pattern of noncompliance once the Agency was no longer involved amounted to a substantial risk to the minor if returned to his care. Those risks were based, in part, on father's false beliefs around the ways he neglected his children over time, his waning motivation to be medication compliant, the fact that he took minimal or no accountability for the current case or the previous child welfare cases, and the fact that he continued to deny that the minor was developmentally disabled. Due to father's failure to display having grasped the implications of his shortcomings, the Agency had grave concerns that father's lack of insight and empathy did not bode well for the prospect of father sustaining progress in the home after termination of the Agency's oversight. It was also noted that, despite father's ongoing engagement in mental health services, he had yet to demonstrate consistent stability in his mental health.

On May 16, 2019, following a contested 18-month review hearing, the court continued the minor's out-of-home placement, terminated father's reunification services, and set the matter for a section 366.26 hearing. A subsequent report filed by CASA Frank Maio recommended that the court terminate father's parental rights and free the minor for adoption by his current caretakers.

The section 366.26 report concluded that, while father loved the minor, the minor did not share a positive parent-child relationship bond or attachment with father to such a degree that maintaining the parent-child relationship would outweigh the benefits and stability of adoption. It was noted that the minor, who was placed with his current caregivers in December 2017, spent a third of his life in out-of-home placement throughout two dependency cases due to his parents' ongoing neglect and inability to meet his needs. The Agency found the minor adoptable and recommended the court terminate parental rights and designate a permanent plan of adoption for the minor.

At the contested section 366.26 hearing on December 11, 2019, following witness testimony including that of father, the court adopted the Agency's recommended findings and orders, finding the minor was adoptable and no exception to adoption applied, and terminated parental rights, identifying adoption as the appropriate permanent plan for the minor.

DISCUSSION

I

ICWA Compliance

Father claims the juvenile court erred in finding the ICWA did not apply without first ensuring proper compliance with the ICWA inquiry and notification requirements. We will reverse and remand for further limited proceedings.

Background

Father's parental notification of Indian status indicated he had no known Indian ancestry. However, he reported the minor and his siblings may have Indian heritage based on mother's ties to the Alaskan Aleut Tribe. Mother's parental notification of Indian status indicated mother may be a member of or eligible for membership in the Aleut Tribe (on file with CPS).

At the detention hearing, the court took judicial notice of a finding in prior dependency case No. PDP080034, that the ICWA applied in this case.³

On October 6, 2017, the Agency sent ICWA notices to the Bureau of Indian Affairs (BIA), the Secretary of the Interior, the Sitka Tribe of Alaska, the Ketchikan⁴ Indian Corporation, and the Alaska Regional Director of the BIA (Alaska BIA). The notices included information about mother, the maternal grandmother, and the maternal great-grandmother. Included in the “Additional information” portion of the form regarding mother was the following statement: “see attached Certificate of Indian Blood (Descendant) from the Bureau of Indian Affairs dated 02/18/2000 (Certificate is for minor’s brother, they have the same mother and father.)” The certificate stated the minor’s sibling P.Z.’s degree of blood was “1/16 Aleut.”

The Alaska BIA directed a letter to the Agency confirming possible tribal affiliation with the Sitka Tribe of Alaska and the Ketchikan Indian Corporation.

The October 2017 jurisdiction report confirmed that the Agency noticed the Sitka and Ketchikan Tribes and was awaiting responses.

The Agency filed copies of the ICWA return receipts from the BIA on October 19, 2017, and from the Secretary of the Interior, the Alaska BIA, the Sitka Tribe of Alaska, and the Ketchikan Indian Corporation on October 25, 2017.

The Ketchikan Indian Corporation sent a letter to the Agency on November 14, 2017, stating it would not be intervening in the case because enrollment rules of the tribe required “30 days of residency in Ketchikan, Alaska prior to acceptance for enrollment” and confirming neither the minor nor his two siblings were eligible for enrollment and had not been verified with the tribe as biological children of a tribal member.

³ Documentation from the prior case was not included in the record on appeal.

⁴ The tribe is apparently misspelled “Katchikan” in various parts of the ICWA documentation.

The December 2017 disposition report stated the ICWA may apply based on mother's reported Indian ancestry with "Alaska Aleutian Tribal Groups," but mother had not provided the Agency with any enrollment documentation. The report stated further, "However, based on information obtained in the prior dependency matter the Agency had documentation that the children may be eligible for enrollment based on having an ancestor listed on the Alaskan Native Claims Settlement Act (ANNCSA) [sic] Roll dated December 31, 1981." When the Agency contacted the Alaska BIA to clarify whether the children were enrolled or eligible for enrollment based on the Alaskan Native Claims Settlement Act information, the Alaska BIA reported possible tribal affiliation "with the Sitka Tribe of Alaska, Ketchikan, Alaska or the Ketchikan Indian Corporation."

The report noted the response previously received from the Ketchikan Indian Corporation and set forth the Agency's efforts to contact a representative of the Sitka Tribe of Alaska. The Agency reported contact with the enrollment official for the Sitka Tribe of Alaska, Christine Paul, on November 28, 2017, who confirmed the minor and his siblings were not enrolled in the tribe and stated that "if there is an ancestral name on the ANNCSA [sic] Roll as described, she would also need other documentation to complete enrollment, including birth certificates and a certification of Native blood for each child."

On December 1, 2017, the court ordered the Agency to "notice all Alaskan tribes with the exception of Ketchikan."

On December 11, 2017, the Agency sent ICWA notices to 44 Alaskan tribes. The notices included the same information included in the first set of notices and noted mother was a "[d]irect descendent of an Alaska Native enrollee who is listed on the Alaska Native Claims Settlement Act roll dated 12-18-71." The notices also included the minor's birth certificate and documentation from the Alaska BIA stating the minor's blood quantum was "1/16 ALT."

A number of tribes sent responses to the Agency confirming the minor was neither enrolled nor eligible for enrollment.

The Agency's continued efforts to obtain additional ICWA information from the parents were documented in the January 2018 addendum report, which stated in part: "On January 23, 2018, the ongoing social worker, Brianne Hickey, called the father to inquire what progress had been made in finding the documents needed to enroll the minors in the correct Tribe. The father stated that the mother had taken all of the documents with her when she left. Ms. Hickey reminded the father that the mother had not taken her property when she left the home, and that the mother has reported that the documents could be in the garage, which the father denied. On January 25, 2018, Ms. Hickey spoke to the mother who stated that she left the documents in the dresser at her previous home, and stated that she does not know which Tribe she has heritage in. ¶¶ As of this January 22, 2018, the Agency has received return receipts for all Tribes. All Tribes who have responded stated the minors are not eligible for enrollment. Social worker Jenny Misirli contacted the Alaska Bureau of Indian Affairs, as suggested by the The [sic] Bureau of Indian Affairs, to make an inquiry of [sic] behalf of the minors regarding possible heritage. Social worker Misirli left a message for the Alaska BIA, and as of the date of this writing the Agency has not received a reply." The report also stated that documentation certifying the minor and his two siblings were of Indian blood was provided to social worker Misirli on January 25, 2018.

At the January 30, 2018 contested disposition hearing, the parties discussed with the court that the last return receipt from the noticed tribes was received January 10, 2018. Based on that information, the Agency requested that the court set a hearing 60 days from January 10, 2018, to determine what, if anything, still needed to be addressed in terms of ICWA compliance. The court noted the minor had a blood quantum of 1/16 and was a direct descendant of the Aleut Tribe, and stated that it was necessary to continue to determine whether the ICWA may apply through the entire proceedings. The court continued: "But I think we can proceed today, but I just want this big asterisk to be standing out there on the ICWA issue as we proceed through these proceedings because

it's pretty obvious to the Court that—that they're [(the minor and his siblings)] eligible for membership somewhere in the Aleut tribes. So I think notice is fine today, and we can go forward.” At the conclusion of the hearing, the court found the minor may be an Indian child and notice to the tribes had been provided as required by law.

Over one year later, the March 2019 status review report stated that while the court had previously made a finding that the ICWA may apply based on mother's claim of Indian ancestry in the Aleut Tribe, the Agency had yet to receive any documentation indicating enrollment or eligibility for enrollment from mother. Of the 44 Aleut tribes noticed by the Agency in December 2017, 11 confirmed the minor was neither enrolled nor eligible for enrollment and the remaining 33 provided no response at all during or after the 60-day period. Based thereon, the Agency requested that the court find the ICWA does not apply.

The August 2019 section 366.26 report reiterated its statements regarding ICWA compliance in the March 2019 report, adding that the court “found that the Agency had complied with ICWA noticing requirements” on January 30, 2018, and again requesting a finding that the ICWA does not apply.

At the contested section 366.26 hearing on December 11, 2019, the court found the ICWA does not apply.

Law

“The juvenile court and social services agencies have an affirmative duty to inquire at the outset of the proceedings whether a child who is subject to the proceedings is, or may be, an Indian child.” (*In re K.M.* (2009) 172 Cal.App.4th 115, 118-119.) When the juvenile court knows or has reason to know that a child involved in a dependency proceeding is an Indian child, the ICWA requires that notice of the proceedings be given to any federally recognized Indian tribe of which the child might be a member or eligible for membership. (25 U.S.C. §§ 1903(8), 1912(a); *In re Robert A.* (2007) 147 Cal.App.4th 982, 989.) “At that point, the social worker is required, as soon

as practicable, to interview the child’s parents, extended family members, the Indian custodian, if any, and any other person who can reasonably be expected to have information concerning the child’s membership status or eligibility.” (*In re Michael V.* (2016) 3 Cal.App.5th 225, 233; see Cal. Rules of Court, rule 5.481(a)(4)(A); § 224.2, subd. (b).)

ICWA notices must include all the following information, if known: the child’s name, birthplace, and birth date; the name of the tribe in which the child is enrolled or may be eligible for enrollment; names and addresses of the child’s parents, grandparents, great-grandparents, and other identifying information; and a copy of the dependency petition. (§ 224.3, subd. (a)(5)(A)-(D); *In re Mary G.* (2007) 151 Cal.App.4th 184, 209.)

Analysis

Father makes several claims arguing the insufficiency of the court’s ICWA findings and the ICWA notices themselves. He speculates the ICWA notices sent by the Agency to the various tribes “appeared to contain insufficient information regarding the maternal family”—that is, the information “only consisted of the name, birthdate and place, and deceased date and place for [the minor’s] maternal grandmother” and “the name for [the minor’s] maternal great grandmother.” He also argues information was “readily available” through mother but inquiry of her by the Agency and the court was insufficient and there was no evidence the Agency made any effort to obtain information from the prior dependency case. We need not discuss those claims, which lack merit, are speculative, or were made in passing, in light of the single meritorious claim made by father, to wit, information known to the Agency about the maternal grandfather was not included in the ICWA notices, which requires reversal and remand for further limited proceedings.

As a preliminary matter, the juvenile court’s ICWA findings were based on the fact that, as of January 2018, the Agency noticed all 44 of the relevant Alaskan tribes, received return receipts from all 44 of the noticed tribes (the last of which was received

on January 10, 2018), received responses from some of the 44 tribes confirming the minor was not an Indian child, and was awaiting responses from the remaining tribes and the Alaska BIA. The March 2019 status review report confirmed that, of the 44 tribes noticed by the Agency, 11 confirmed the minor was neither enrolled nor eligible for enrollment and the remaining 33 provided no response at all during or after the 60-day period. The August 2019 report reiterated those facts. Based thereon, at the December 11, 2019 hearing, the court found the ICWA does not apply.

The record demonstrates that the court took judicial notice of the ICWA finding in the prior dependency proceeding, and that the Agency consulted the documentation in the prior proceeding to gather information for, among other things, its ICWA inquiry. The record makes plain that the social worker regularly reached out to both parents to attempt to obtain information to help with the ICWA inquiry, to no avail. The record also makes plain that mother provided scant information at the inception of the case, then provided no information thereafter because she either did not know or could not recall the information, could not find the relevant documentation, or simply was not present at the various court proceedings.

Mother did, however, provide information about the maternal grandfather, as evidenced by the Agency's recitation of mother's general history in the December 2017 disposition report, which included the maternal grandfather's name, the fact that he was once in the United States military, and the fact that he had lived in California and was living in Colorado at the time of the report. That information, known to the Agency, was not included in the ICWA notices. The Agency reported it obtained information from the prior dependency matter that the minor may be eligible for enrollment based on having an ancestor listed on the Alaskan Native Claims Settlement Act Roll dated December 31, 1981. The Agency provided the tribes with notices that included the minor's birth certificate, a certificate of Indian blood from the Alaska BIA, and information about the

mother, the maternal grandmother, and the maternal great-grandmother, but nothing related to the maternal grandfather.

The Agency argues it sent notice to all Aleut tribes with all known information it could gather but makes no mention of the maternal grandfather or its omission of his name from the ICWA notices. Whether the Agency contacted the maternal grandfather or attempted to speak with him is a mystery given the absence of any mention of him in the record. That problem is compounded by the fact that the court never inquired about what efforts the Agency made to obtain information from the maternal family members. “[O]nce there is sufficient information to believe that the child[] might be [an] Indian child[] within the meaning of ICWA and the California statutes, ‘responsibility for compliance’ with those statutes ‘falls squarely and affirmatively’ on *both* the social services agency and the court. [Citation.] Accordingly, the court has a responsibility to ascertain that the agency has conducted an adequate investigation and cannot simply sign off on the notices as legally adequate without doing so.” (*In re K.R.* (2018) 20 Cal.App.5th 701, 709 (*K.R.*)).

It is true, as the Agency argues, that the affirmative and continuing duty of inquiry does not require the social services agency to conduct a comprehensive investigation into the minor’s Indian status or to “cast about for Indian connections.” (*In re C.Y.* (2012) 208 Cal.App.4th 34, 42; *id.* at p. 39; *In re S.B.* (2005) 130 Cal.App.4th 1148, 1161.) However, it must include in its reports a discussion of what efforts it undertook to locate and interview family members who might have pertinent information and, “in the absence of an appellate record affirmatively showing the court’s and the agency’s efforts to comply with ICWA’s inquiry and notice requirements, we will not, as a general rule, conclude that substantial evidence supports the court’s finding that proper and adequate ICWA notices were given or that ICWA did not apply.” (*In re N.G.* (2018) 27 Cal.App.5th 474, 484; accord, *K.R.*, *supra*, 20 Cal.App.5th at p. 709.) While it is reasonable to infer from the record that the Agency consulted the ICWA information in

the prior dependency proceeding of which the juvenile court took notice, that documentation was not included in the record on appeal and we do not speculate as to whether that information definitively excluded the maternal grandfather as a potential source of the minor's Indian heritage.

Acknowledging its duty to interview the minor's parents, extended family members, and any other person who can reasonably be expected to have information concerning the minor's membership status or eligibility, the Agency argues it interviewed mother "and attempted to obtain contact information about the extended family members to no avail." Again, the Agency obtained information about the maternal grandmother from mother, but we see nothing in the record that demonstrates there was any effort to contact the maternal grandfather or obtain any information from him regarding the maternal family's Indian ancestry. The Agency cannot fulfill its continuing duty of inquiry and notice by omitting known information or speculating that the minor's Indian ancestry flowed only from the maternal grandmother and maternal great-grandmother and not from the maternal grandfather, "[n]or can the juvenile court assume that because *some* information was obtained and relayed to the relevant tribes, the social services agency necessarily complied fully with its obligations." (*K.R.*, *supra*, 20 Cal.App.5th at p. 709.)

On this record, we cannot say with certainty that the notices were legally sufficient or that there was no prejudice to the relevant tribes. If we conclude the juvenile court did not comply with the ICWA provisions, we "reverse only if the error is prejudicial." (*In re A.L.* (2015) 243 Cal.App.4th 628, 639.) Error is not presumed. It is father's obligation to present a record that affirmatively demonstrates error. (*In re D.W.* (2011) 193 Cal.App.4th 413, 417-418.) Father has done so here.

The Agency either did not take sufficient affirmative steps to investigate the minor's possible Indian ancestry or did not document its efforts to do so, and the juvenile court failed to ensure that an adequate investigation had been conducted. In the absence

of evidence of the Agency's efforts to fulfill its continuing duty of inquiry, we cannot say the failure of ICWA compliance was harmless. A failure to conduct a proper ICWA inquiry requires reversal of the orders terminating parental rights and a limited remand for proper inquiry and any required notice. (*In re A.B.* (2008) 164 Cal.App.4th 832, 839; *In re D.T.* (2003) 113 Cal.App.4th 1449, 1454-1456.) We must therefore remand for limited proceedings to determine the ICWA compliance.

II

Beneficial Parental Relationship Exception

Father contends there was insufficient evidence to support the juvenile court's finding that the beneficial parental relationship exception to adoption did not apply. The claim lacks merit.

At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must choose one of the several “ ‘possible alternative permanent plans for a minor child. . . . *The permanent plan preferred by the Legislature is adoption.* [Citation.]’ [Citation.] If the court finds the child is adoptable, it *must* terminate parental rights absent circumstances under which it would be detrimental to the child.” (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368.) There are only limited circumstances which permit the court to find a “compelling reason for determining that termination [of parental rights] would be detrimental to the child.” (§ 366.26, subd. (c)(1)(B).) The party claiming the exception has the burden of establishing the existence of any circumstances which constitute an exception to termination of parental rights. (*In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1372-1373; *In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252; Cal. Rules of Court, rule 5.725(d)(4); Evid. Code, § 500.)

Termination of parental rights may be detrimental to the minor when “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) However, the benefit to the child must promote “the well-being of the child to such a degree as to

outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging that a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575; *In re C.F.* (2011) 193 Cal.App.4th 549, 555.)

"We must affirm a trial court's rejection of [the exception] if the ruling is supported by substantial evidence. [Citation.]" (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.)

Here, there was substantial evidence to support the court's finding that the beneficial parental relationship exception did not apply. While it is undisputed that father had regular and consistent visitation, it was the quality of those visits that called into question the benefit to the minor. In early-2018, the foster parent reported the minor was quiet, removed, and out of sorts when he returned from visits with father. Father struggled to engage in play and other developmentally appropriate activities with the minor, while the minor seemed resistant to father's efforts to do so. Father cancelled visits or showed up to visits disheveled and in a negative mindset and failed to properly protect the minor from harm while walking out in the community. In mid-2018, father became fixated on an active volcano in Hawaii, had to be redirected from talking about his previous stint in jail and his personal mental health challenges, and ignored the minor while engaging in long discussions about religion with the minor's sibling. He also challenged the social worker's attempts to have him interact directly with the minor to help develop the minor's speech. While therapeutic visits were generally appropriate, they still required direct supervision of father due to his inconsistency in focus, mood, and mental state and his engagement with and lack of adequate supervision of the minor.

In late-2018, father continued to have trouble engaging with the minor and still had to be reminded to ensure the minor's care and safety.

While father's visits improved some over time, he had ongoing issues with his inability or unwillingness to implement strategies and skills taught to him and resisted learning new information. Any benefit of continued contact with the minor was significantly outweighed by concerns regarding father's refusal to accept responsibility for his part in the minor's removal, his failure to acknowledge the minor's diagnosed developmental disabilities and needs associated therewith, and his persistent belief that the social worker was colluding with mother to keep his children from him despite the court having found those accusations to be untrue. This, in light of father's history of not following through in prior dependency cases once Agency involvement ceased and his refusal to believe his acts or omissions placed the children at risk, was sufficient to support the court's finding that the beneficial parental relationship exception did not apply.

Additionally, the minor had spent nearly one-third of his life in out-of-home placement, had been with his current foster family since December 2017, and was flourishing in foster care. The foster family expressed their love for and desire to adopt the minor, and the foster parents were well-equipped to deal with the minor's many issues.

Substantial evidence supported the juvenile court's finding that the beneficial parental relationship exception to adoption did not apply.

DISPOSITION

The juvenile court's order terminating parental rights is conditionally reversed. The matter is remanded to the juvenile court for limited proceedings to determine the ICWA compliance. If, at the conclusion of those proceedings, no tribe indicates the minor is an Indian child within the meaning of the ICWA, then the juvenile court shall

reinstate the order terminating parental rights. In all other respects, the judgment is affirmed.

/s/
BLEASE, P. J.

We concur:

/s/
MURRAY, J.

/s/
HOCH, J.